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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 508th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 14 July 1993, at 9.30 a.m.

Chairman: Mr. MOHAMMED (Nigeria)

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The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add. 1 and 2, A/CN.9/377, A/CN.9/378 and Add.1, A/CN.9/XXVI/CRP.5)

Consideration of draft Model Law on Procurement (continued)

Articles 15 bis and 36 bis (continued)

1. Mr. PEREZNIETO CASTRO (Mexico) supported the proposal by the Inter-American Development Bank as restricted tendering would thereby be treated as a method of procurement in chapter II and not buried in chapter III among the tendering proceedings. With regard to article 15 bis, he proposed that paragraphs (b), (c) and (d) be replaced by a new paragraph (b) reading as follows: "the time and cost of the examination and evaluation of a large number of tenders would be disproportionate to the value of the goods or construction to be procured". That wording was derived from paragraph 3 of the commentary on article 18 in the draft Guide to Enactment (document A/CN.9/375).

2. With regard to article 36 bis, he proposed the deletion of ", except that publicity requirements shall not apply".

3. Mr. WALLACE (United States of America) said that - like the representatives of Canada and the United Kingdom and the observer for Australia, who had expressed their views towards the end of the previous meeting - he had doubts about the advisability of introducing two articles on restricted tendering; one should not give it unwarranted publicity. He would have preferred to make the provisions of article 18 (3) more stringent.

4. If it was the wish of the Commission to adopt the proposed articles, however, he would support the Mexican representative's proposal for amending article 15 bis and reserve the right to propose additional changes in that article.

5. He agreed that the reference to publicity requirements in article 36 bis should be deleted, although it should be made clear that the aim of the deletion was to remove the need for advance publicity as opposed to ex post facto publicity.

6. Mr. PARRA PEREZ (Observer for Venezuela), expressing strong support for the proposal of the Inter-American Development Bank, said that in Latin America restricted tendering was widely used as a procurement method intermediate between single-source procurement and totally open tendering.

7. If the Model Law did not provide for restricted tendering, it was possible that Latin American countries would resort increasingly to single-source procurement. The proposal of the Inter-American Development Bank would therefore promote - rather than inhibit - competition and freedom of trade.

8. The proposals just made by the Mexican representative would have to be studied. Meanwhile, he felt that in paragraph (d) of article 15 bis the words "for small quantities" should be changed to something like "of low value".

9. Ms. PIAGGI-VANOSSI (Argentina) said that the possibility that the procuring entity would resort to restricted tendering should be reduced as far as possible. She therefore supported the proposals made by the representative of Mexico, and particularly the deletion of the last phrase of article 36, for publicity should be as wide as possible in cases of restricted procurement.

10. Mr. SHIMIZU (Japan), also supporting the Mexican proposal to delete the last phrase of article 36, referred to the suggestion made by the Japanese Government regarding article 18 in document A/CN.9/376/Add.2 and said that publicity was particularly important in the case of restricted tendering; people had access to the record, but only after the event. He would therefore favour the publication of some kind of notice in an official gazette or a similar journal, it being understood that the notice would not be published too late to be of anything but historical interest.

11. With regard to the burden on the procuring entity resulting from publicity requirements, he associated himself with what the United States representative had said at an earlier meeting about such burdens being in the interests of transparency.

12. Mr. GRIFFITH (Observer for Australia) expressed misgivings about the proposed introduction of two new articles into the Model Law at such an advanced stage in the Commission's examination of the draft. There might not be sufficient time to reflect on the consequences of introducing the two articles, and the Commission might afterwards find that it had made a mistake.

13. As there were already provisions in the draft covering restricted tendering, the Commission should try to adapt them to what it considered necessary with a minimum of change.

14. Mr. JAMES (United Kingdom) expressed concern that the discussion appeared to be developing into a debate between countries where restricted tendering was employed and countries where it was not; in fact, restrictive tendering was employed throughout the world - for example, it was permitted by European Community directives. At the same time, all agreed that restricted tendering was less desirable than public tendering and that it should be treated as an exception.

15. He was attracted by the Mexican proposal for amending article 15 bis as it highlighted an important point - namely, that restricted tendering should be permitted in cases where, for example, the cost of evaluating large numbers of tenders was greater than the cost of the goods to be procured.

16. With regard to paragraph (b) of article 15 bis as proposed by the Inter-American Development Bank, he said that in cases of urgency restrictive tendering would not take a significantly shorter time than public tendering, and procedures for meeting urgent needs were already provided for in the Model Law.

17. With regard to paragraph (c), he felt that where public tendering had failed restricted tendering was unlikely to be successful - unless the suppliers or contractors had meanwhile formed a cartel.

(Mr. James, United Kingdom)

18. With regard to paragraph (d), the problems that arose where the costs of tendering were disproportionately high would be overcome by the formulation proposed by the representative of Mexico, in which he would suggest that the word "significantly" be inserted before "disproportionate".

19. With regard to the second sentence in paragraph (1) of article 36 bis, if qualification was mandatory for all procurement methods one could delete the words "reputable firms well known in the field and".

20. He agreed with the comment made by the United States representative that it should be made clear that the aim of the deletion of the last phrase of article 36 bis was to remove the need for advance publicity and suggested that the phrase be replaced by "except the solicitation requirements set forth in articles 18 (1) and (2)". He also agreed with the comment made by the Japanese representative regarding the publication of some kind of notice in an official gazette or a similar journal.

21. In reply to a question from the Chairman, he said that in the light of the proposal made by the Mexican representative for amending article 15 bis he could withdraw his proposal - made at the previous meeting - for the addition of a paragraph (e).

22. Mr. TUVAYANOND (Thailand), noting that the proposals of the Mexican representative would entail the disappearance of paragraph (b) of article 15 bis, said he could not accept that; countries experiencing rapid economic growth were often faced with urgent needs that public tendering could not meet rapidly enough.

23. With regard to paragraph (d) of article 15 bis, he repeated the suggestion he had made at the previous meeting that the paragraph be amended to read "the procurement is of minor significance".

24. While he agreed that publicity might be desirable in order to ensure transparency, he felt it would suffice if a record was kept and made available to the public on request.

25. Mr. ANDERSEN (Denmark) expressed misgivings about the practical implications of adopting the two articles under consideration; he felt it would be better to keep article 18 as proposed by the Working Group.

26. If article 36 bis was going to be accepted, however, he would like to see the word "may" in paragraph (1) replaced by "shall".

27. Mr. MORAN BOVIO (Spain) said that, with the amendments suggested during the discussion, the Commission seemed to be well on the way to reaching a consensus on the two new articles.

28. Mr. WALLACE (United States of America), agreeing with the representative of Spain, said he felt there was a need for publicity over and above that achieved by keeping a record and making it available to the public on request.

(Mr. Wallace, United States of America)

29. He suggested that in paragraph (a) of article 15 bis the word "only" be added before "a limited number" and that "products or works" be amended to "goods or construction".

30. Mr. LEVY (Canada) said he could not support the consensus that seemed to be emerging. There were provisions elsewhere in the Model Law covering restricted tendering, and he did not see the need to elevate such tendering into a special method of procurement.

31. Mr. PHUA (Singapore) said that the reference to "reasons of economy and efficiency" in article 18 (3) should be included in article 15 bis and that the requirement - also in article 18 (3) - that the grounds and circumstances for employing restricted tendering should be recorded in the record of the procurement proceedings should be reflected in article 36 bis, the final phrase of which should be replaced by a reference to articles 18 (1) and 18 (2).

32. Mr. SAHAYDACHNY (Secretariat) said that, if an article on restricted tendering was included in chapter II, the recording requirement would be covered by article 11 (2).

33. Mr. TUVAYANOND (Thailand) said he found it difficult to understand why more thought was not being given to the danger of delaying governmental projects and why the deletion of paragraphs (b), (c) and (d) of article 15 bis was being so seriously contemplated.

34. The CHAIRMAN reminded the representative of Thailand that other procurement methods, such as single-source procurement, were envisaged for cases of urgency.

35. Mr. WALLACE (United States of America) said he agreed with the United Kingdom representative that in cases of urgency restricted tendering would not take a significantly shorter time than public tendering.

36. Mr. PEREZNIETO CASTRO (Mexico), responding to a point raised by the United States representative, said that paragraph (a) of article 15 bis was concerned with the complexity or specialized nature of the goods or construction, whereas paragraph (b) as proposed by him was concerned with situations where the time and cost of the tendering procedure were disproportionately high in relation to the value of the envisaged contract.

37. Mr. WALSER (Observer for the World Bank) said that, ideally, restrictive tendering should be permitted only under the circumstances envisaged in paragraph (a) of article 15 bis. However, if only a limited number of suppliers or contractors existed, the procuring entity should be obliged to send invitations to all of them.

38. If paragraph (b) as proposed by the representative of Mexico were adopted, the selection of suppliers or contractors to be invited to tender would be necessary, since to solicit a large number of tenders would result in disproportionately high evaluation costs.

39. Mr. PEREZNIETO CASTRO (Mexico) suggested that the words "selected by it" be deleted from the first sentence in paragraph 1 of article 36 bis as the underlying idea was conveyed by the words "selected in non-discriminatory manner" in the second sentence.

40. The CHAIRMAN asked the Commission whether it wished, subject to the advice of the drafting group, to adopt article 15 bis amended to read as follows:

> (Subject to approval by ... (each State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of restricted tendering, when necessary for reasons of economy and efficiency, in accordance with article 36 bis, when:
>
> (a) by reason of the highly complex or specialized nature of the goods or construction required, only a limited number of suppliers or contractors of those goods or construction exist;
>
> (b) the time and cost of the examination and evaluation of a large number of tenders would be significantly disproportionate to the value of the goods or construction to be procured.

41. It was so decided.

42. The CHAIRMAN then asked the Commission whether it wished, subject to the advice of the drafting group, to adopt article 36 bis without the phrases "selected by it" and "reputable firms well known in the field and" in paragraph (1) and with the words "that publicity requirements shall not apply" in paragraph (2) replaced by "the solicitation requirements set forth in articles 18 (1) and (2)".

43. It was so decided.

44. The CHAIRMAN finally asked the Commission whether it wished to request the drafting group: to devise wording conveying the idea - put forward by the observer for the World Bank - that invitations to tender should be sent to all suppliers or contractors under the circumstances envisaged in paragraph (a) of article 15 bis; to consider whether, in paragraph (1) of article 36 bis, "may solicit" should be replaced by "shall solicit"; and to consider how provision might be made for the publication of some kind of notice in an official gazette or a similar journal.

45. It was so decided.

The meeting was suspended at 11.25 a.m. and resumed at 11.55 a.m.

Articles 38-43

46. Mr. TUVAYANOND (Thailand), referring to article 38 (1), said loss or injury should not be the main justification for having recourse to the review mechanism; recourse should be permissible if the supplier or contractor had reasonable grounds to believe that the procuring entity was in breach of its duty under the Model Law. It was sometimes very difficult to prove loss or injury as a result of a breach of duty on the part of the procuring entity.

47. Mr. JAMES (United Kingdom) said that there must, of course, be an alleged breach of duty by the procuring entity for review to be sought, but under most common law systems and, he believed, in most civil law jurisdictions the supplier or contractor must, in order to be able to initiate review proceedings, claim loss or injury - or potential loss or injury. One should not depart from the principle that such a claim should be made in addition to a claim that there had been a breach of duty on the part of the procuring entity.

48. Mr. PHUA (Singapore), agreeing with the United Kingdom representative, said that article 38 (1) should be left as it stood. In that connection, he noted that the comments on article 38 in the draft Guide to Enactment (document A/CN.9/375) referred to the avoidance of "an excessive degree of disruption that might impact negatively on the economy and efficiency of public purchasing"; it was also pointed out that the degree of detriment that was required to be claimed was an issue to be resolved under the relevant legal rules in the enacting State.

49. Mr. PEREZNIETO CASTRO (Mexico) supported what had been said by the representative of the United Kingdom. The various issues had been discussed by the Working Group and a balanced text arrived at. A change would affect the structure of chapter V of the Model Law.

50. Mr. KOMAROV (Russian Federation) thought that it was logical that the possibility of seeking review should be limited to suppliers or contractors that had suffered or might suffer loss.

51. Mr. MORAN BOVIO (Spain) suggested that, as a matter of procedure and to save time, when a proposal to amend the Working Group's text met with opposition and no further support was expressed for it, it might be best to drop the matter and decide simply to leave the text as it stood.

52. Mr. WALLACE (United States of America) drew attention to the footnote to the heading of chapter V, which made it clear that the provisions for review were optional. There was perhaps no need for the text of that chapter to be debated in detail.

53. The CHAIRMAN suggested that the Commission consider articles 38-43 (chapter V) as a whole.

54. Mr. TUVAYANOND (Thailand) said that he could support adoption of the chapter as a whole, but would like to inquire whether it was intended that the square brackets around certain phrases should remain in the final text.

55. Mr. SAHAYDACHNY (Secretariat) said it was intended that the square brackets should remain; the idea was to offer options to enacting States.

56. Ms. CLIFT (Observer for Australia), supporting the adoption of articles 38-43, said that the commentary in the draft Guide to Enactment should say more about the reasons for choosing either option I or option II in the case of article 40 (3) (f).

57. The CHAIRMAN said that the point would be borne in mind when the Commission took up the draft Guide to Enactment.

58. Ms. CRISTEA (Observer for Romania), recalling that the Commission had agreed to delete article 18 (3), asked whether article 38 (2) (c) should be deleted as a consequence.

59. Mr. SAHAYDACHNY (Secretariat) said that, in his opinion, the subparagraph in question should be deleted; the matter would now be covered by subparagraph (a) of article 38 (2).

60. Mr. JAMES (United Kingdom) supported the amendment to article 38 (2) (d) proposed in document A/CN.9/377 by the Secretariat. The drafting group might consider whether there should also be a reference in article 38 (2) to article 21 (s).

61. The CHAIRMAN asked whether the Commission was ready to adopt articles 38-43 with the change proposed by the Secretariat to article 38 (2) (d), on the understanding that the references would be looked at by the drafting group.

62. It was so decided.

Article 32 (continued)

63. Mr. WALLACE (United States of America), recalling that, at its 506th meeting, the Commission had agreed that article 32 (6) should allow for publication of the notice of a procurement contract, but in a manner that would not involve undue expense for the procuring entity, suggested that article 32 (6) provide for the establishment of a cut-off figure below which publication in an official gazette or a similar journal would be sufficient, or no publication would be required, and above which there would be a notice requirement designed to ensure that the appropriate audience was reached.

64. Mr. TUVAYANOND (Thailand) thought it would be sufficient to provide that the public should have access to information on all the decisions taken.

65. Mr. LEVY (Canada) said that he could accept the idea behind the suggestion made by the representative of the United States and proposed that the amendment to article 32 (6) take the form of a new sentence along the following lines: "Procuring entities shall, in accordance with the regulations, publicize the award of procurement contracts".

66. Mr. JAMES (United Kingdom) thought that the solution was perhaps too simple; the extent of the publicity required should depend on the value of the contract.

The meeting rose at 12.30 p.m.